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ATTENTION: Docket no. 2007-OE-01

Please find for filing the Application for Rehearing of the Commonwealth of Pennsylvania, Edward G. Rendell, Governor of the Department of Energy's Mid-Atlantic Area National Interest Electric Transmission Corridor Designation, Docket No. 2007-OE-01. Filing is made by fax and overnight mail.

Sincerely,

Scott Perry
Assistant Counsel

Enclosure

UNITED STATES OF AMERICA
BEFORE THE UNITED STATES DEPARTMENT OF ENERGY

RE: NATIONAL INTEREST ELECTRIC TRANSMISSION CORRIDOR DESIGNATIONS	Docket No. 2007–OE–01, Mid–Atlantic Area National Corridor

Application for Rehearing of the Commonwealth of Pennsylvania, Edward G. Rendell, Governor

The size and scale of the Mid-Atlantic Area National Interest Electric Transmission Corridor is staggering, unprecedented and unlawful. The Corridor stretches from the Canadian border to northern Virginia and from the Atlantic Ocean to eastern Ohio and West Virginia. It includes all or major portions of eight states and the District of Columbia. The Department of Energy was only able to designate such a vast region of this Country as a corridor by ignoring express statutory requirements, by avoiding mandated statutory procedures and by improperly construing Section 216 of the Federal Power Act in a manner to minimize its obligations while grossly expanding the size and scale of corridor beyond that intended by Congress.

Pursuant to Section 313 of the Federal Power Act, the Commonwealth of Pennsylvania, Edward G. Rendell, Governor apply for rehearing of the October 5, 2007 Order of the Department designating the Mid–Atlantic Area National Corridor.

All communications with respect to this matter should be addressed as follows:

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I. Background

On May 7, 2007 the United States Department of Energy, Office of Electricity Delivery and Energy Reliability ("Department") published its *Draft National Interest Electric Transmission Corridor Designations*, 72 FR 25838 (May 7, 2007) ("Notice"), as later amended by a *Notice of Errata*, 72 FR 31571 (June 7, 2007). In its Notice, the Department designated all or major portions of West Virginia, Pennsylvania, Maryland, Delaware, the District of Columbia, New Jersey, New York and Virginia, as well as large portions of Ohio as National Interest Electric Transmission Corridors ("NIETC"s) under Section 216 of the Federal Power Act ("FPA"). It requested comments from interested parties and states on or before July 6, 2007.

The Commonwealth of Pennsylvania ("Commonwealth"), Edward G. Rendell, Governor, filed timely comments regarding the Department's Draft Mid-Atlantic Area National Corridor Designation on July 6, 2007. As such, the Commonwealth has been granted party status. On October 5, 2007, the Department issued its Order which designated the Mid-Atlantic Area National Corridor.

II. Specifications of Error

The Commonwealth submits that the Department erred in its Order as follows:

1. The Department's designated corridor is overbroad. The Department ignores the plain language of section 216 of the FPA which requires the "geographic area" to be a narrowly drawn corridor. The Department also ignores the unambiguous requirement that the corridor be limited to areas presently experiencing electric energy transmission capacity constraints or congestion. Finally, the Department's designation includes areas where no consumers are being adversely affected – even under the Department's grossly inflated definition of the phrase.

2. In violation of the plain language of the Act, the Department failed to consider *any* alternatives prior to designating the corridor. Nowhere in the Department's Order does the Department state that it considered any alternatives in any way. Instead the Department described why it was not statutorily obligated to consider alternatives recommended by interested parties.

3. The Department failed to comply with the National Environmental Policy Act and prepare an environmental impact statement prior to designating the Mid-Atlantic Area National Corridor. Properly designating a narrow corridor along existing transmission pathways where consumers are being affected by transmission congestion or constraints is a major Federal action significantly affecting the quality of the human environment.

4. The Department failed to consult with the Commonwealth while conducting its study of electric transmission congestion and failed to consider comments submitted by the Commonwealth. The so-called consultation with affected states, which occurred too late in the process, was not timely and failed to comply with the statutory mandate.

5. The Department abused its discretion in choosing to designate the Mid-Atlantic Area National Corridor.

III. Argument

A. The Mid-Atlantic Area National Corridor Designation is Overbroad and not Authorized by Law

The designated corridor is overbroad and contradictory to the plain language of the Act. FPA § 216 (a)(2), states in relevant part:

> [T]he Secretary shall issue a report, based on the study, which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor.

Congresses' use of the term "corridor" acts as a limitation on the more general phrase "geographic area". The Department purports to understand what a corridor is stating that is "an area linking two other areas." 72 FR 57007. More precisely, it is a *narrow* area – or passageway linking two areas. Merriman-Webster's Collegiate Dictionary 10th edition. The Department's designated corridor in no way resembles a narrow passageway experiencing electric energy transmission capacity constraints or congestion. It is instead an all encompassing eight state region, including the District of Columbia, that includes congested and constrained areas, regions where excess capacity exists, areas where future renewable generation may be built and areas where no transmission exists at all.

Including areas that are not *presently* experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers is also contrary to the plain language of the Act. The term "experiencing" can only be interpreted to mean that the congestion or constraint must be presently occurring. Accord, § 216 (a)(2). By the Department's own admission (and interpretation of the phrase "adversely affected"), only the Mid-Atlantic Critical Congestion Area, or "sink", meets this requirement. 72 FR 57004 – 57005.

In contrast, the "source areas" which the Department defines as "areas of existing or potential future generation" (72 FR 56995) and the "outer bound on the geographic range of potential transmission projects", (72 FR 57012) plainly have nothing to do with areas "experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers" or areas experiencing persistent congestion.

The Department's use of the "source and sink" approach to expand the size and scale of the corridor boundaries is inconsistent with the express language of Section 216. The statutory language requires a more focused study and report of specific areas experiencing electric energy transmission capacity constraints or congestion that only supports the use of a "project-based" approach. This approach, which the Department rejected, is the only approach authorized by Section 216.

The Department confuses the factors it may consider in determining *whether* to designate a corridor as factors in determining the scope of the corridor. 72 FR 57007 – 57008. FPA § 216 (a)(4) plainly states "[i]n determining *whether* to designate a national interest electric transmission corridor under paragraph (2), the Secretary may consider whether --" several different factors warrant a designation. The Department cites this

subsection as justification for deviating from the statute's plain language and including source areas within the designated corridor. Had Congress intended to include any area where generation does or could exist in the future as part of the corridor, it would and could have said so.

The Department also misconstrues the term "constraint" to include the "absence of transmission facilities between two or more nodes." 72 FR 57000. This interpretation does not comport with the Congestion Study's definition of "transmission constraint" as "a limitation on one or more transmission elements that may be reached during normal or contingency system operations" and that "constraint refers to the chokepoint on the transmission system that causes such denial of desired transmission service." 72 FR 25843. The Department's new concept of constraint, coupled with its expansive inclusion of source areas within the phrase "experiencing electric energy transmission capacity constraints or congestion" places no limit in the scope of a corridor or on the Department's discretion. The Department manufactures ambiguity in the phrase "congestion or constraint" where none exists and ignores the plain language of the Act.

Finally, the Department was required to base its determination on factual findings that consumers are actually being adversely affected by transmission congestion or constraints. Instead, and in the absence of factually supported findings, the Department concludes that "it is reasonable to interpret the phrase 'congestion that adversely affects consumers' to include congestion that is persistent." 72 FR 57004. Even if this were true, this determination does not apply to the "source areas" as those areas are not experiencing persistent congestion.

The Department should reconsider its decision to designate an eight state region, including the District of Columbia and develop a study and report consistent with the statutory requirements in Section 216.

B. The Department Failed to Perform a Mandated Alternatives Analysis

Section 216 (a)(2) mandates that the Department conduct an alternatives analysis. The Department failed to perform this analysis in the manner prescribed by law. The Department acknowledges that several non-transmission solutions exist to relieve transmission congestion but then states "nothing in FPA section 216 requires or suggests that the Department should engage in a comparison of the relative merits these different solutions to easing congestion in a specific geographic area." 72 FR 56993-56994. This statement is completely contrary to the express language of Section 216 (a)(2) which requires the Department to consider alternatives before designating a corridor. Instead the Department concludes that the phrase "alternatives and recommendations from interested parties" is ambiguous and should only apply to comments suggesting corridor designations for different congestion or constraint problems, comments suggesting alternative corridor boundaries and comments suggesting that the Department refrain from designating a corridor.

The Department's failure to consider the required alternatives and recommendations under Section 216 (a)(2) is directly tied to its unlawful decision to inflate the corridor to the eight state region, including the District of Columbia. If the Department had properly used the "project-based" approach, it would have been able to duly consider alternatives and recommendations to these "project-based" corridors.

The Department's use of the "source and sink" approach designating a vast region covering all or major portions of eight states and the District of Columbia presents too many alternatives. In the face of the multitude of alternatives within the vast area designated by the Department, the Department improperly construed its statutory duty to consider alternatives and recommendations in a manner that avoided the obligation Congress established in Section 216 (a)(2) to conduct a meaningful consideration of alternatives and recommendations to its proposal to designate a corridor. The Department should reconsider its decision and conduct the alternatives analysis mandated by Section 216.

C. The Department Failed to Consult with Affected States

Section 216 (a)(1) required the Department to consult with affected States while conducting a study of electric transmission congestion. The Department never consulted with the Commonwealth of Pennsylvania while conducting its study as the law mandates. After the study was completed and after it had already prepared its draft report, the Department made a belated and feeble attempt to contact affected state officials to offer to meet with state officials. The Department describes these belated efforts in its Order, 72 FR 56992 (Foot Note 18), but this belated and feeble effort does not comply with the Department's statutory mandate to consult with affected states during study. Requesting comments from any interested party after the study was published simply does not rectify this error as several key concepts "decided" in the study (such as the definitions of congestion and constraint) formed the basis of the corridor designation.

In its defense, the Department notes that it is difficult to know which States are "affected" until the conclusions of the congestion study are known. As the agency

charged with overseeing energy matters in the United States, it is difficult to understand how the Department was unaware of which states could possibly be implicated in a transmission congestion study. In fact, it appears the Department was well aware of which States were potentially affected as it designated the Mid-Atlantic Critical Congestion Area based on "numerous well-know constraints". 72 FR 56995. Regardless, Section 216 (a)(1) required the Department to consult with the Commonwealth and the Department completely failed to do so.

The Department also completely fails to consider the comments of the Commonwealth of Pennsylvania in violation of Section 216 (a)(2). The Commonwealth implored the Department to exercise its discretion and not designate a corridor. The Department mischaracterizes the Commonwealth's comment as an "opposition to the regimen established by FPA section 216(a)." 72 FR 57002.

The Department should reconsider its study, report and designation and begin again by performing its mandated duty to consult with affected states before it completes its study.

D. The Department failed to comply with NEPA

The Department has a legal obligation under the National Environmental Policy Act ("NEPA") to prepare a programmatic environmental impact statement ("EIS") before designating a National Corridor. Section 102 (2)(C) of NEPA requires that all Federal agencies include an EIS for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). As stated above, a properly designated corridor will require compliance with NEPA.

To justify its failure to prepare an EIS, the Department concluded that the corridor, per se, has no environmental impact. This conclusion is flawed because the Department's designation of the corridor promotes transmission-based solutions to congestion and is a necessary first step to allowing FERC to preempt state authority and permit transmission project.

In addition, if the Department had followed the only authorized "project-based" approach rather than the unlawful "source and sink" approach, the need to prepare an EIS for the project-based corridor would be clearer. Having a project-based corridor would more easily allow the identification of environmental impacts associated with a particular project that supports a project-based corridor designation. The vast size and scale of a corridor designation resulting from the "source and sink" approach obscures the environmental impacts inherent in a corridor designation.

The Department should reconsider its decision to not prepare an EIS and comply with NEPA if the Department decides to designate a corridor in the future.

E. The Department Abused its Discretion

Designating a corridor is not required by law. Section 216 mandates that a study and report be prepared, but does not require a corridor designation. Instead, such a designation is left to the discretion of the Department.

The Department states that a "designation is not a finding that transmission must or even should be built" 72 FR 56994. This statement is completely contrary to the very purpose of section 216 and the considerations enumerated in 216(a)(4). The only purpose to be served in making this designation is to promote the development of transmission projects in order to relieve congestion. If the Department does not believe that

transmission facilities should be built, it should not have designated the corridor. By admitting that construction or modification of transmission facilities is not necessary, or even helpful, to alleviating the identified constraints and congestion, the Department clearly shows that it has abused its discretion.

The Commonwealth provided several reasons why the Department should refrain from exercising its discretion in designating the corridor. Citing the Commonwealth's comments, the Department concluded that these concerns are simply "opposition to the regimen established by FPA section 216(a)". 72 FR 57002.

The Department should reconsider its decision to designate a corridor and to decline to exercise this discretionary authority at this time for the reasons set forth in this application.

IV. CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests the Department to grant rehearing of its October 5, 2007 Order.

Respectfully submitted,

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